IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 24 OF 2006

Shri Mahadev Balkrishna Raikar,
major in age,
residing at Patim,
House No.1095, Carona, Aldona,
Bardez, Goa. ..... Appellant

V e r s u s

Shri Balkrishna Shankar Nipanikar,
major in age, resident of
House No. F-1-6, Aradhane Apartment,
Aquem Alto, Margao, Goa. ..... Respondent

Mr. Amrut Kansar, Advocate for the Appellant.

Coram:- N. A. BRITTO, J.

Date:- 7th June, 2006.

ORAL ORDER

Aggrieved by the Judgment by the First Appellate Court in reversing the Judgment of the Trial Court, the plaintiff in R.C.S. 144/99/Jr has filed the present Second Appeal on substantial questions of law which are formulated in the first Para of the Memorandum of Appeal.

2. Heard Shri Amrut Kansar, the learned Counsel on behalf of the appellant/plaintiff.

3. The plaintiff had filed a suit for permanent injunction alleging that the plaintiff was the tenant of one of the rooms situated in a building bearing Village Panchayat no. 454(New), on the first floor. The plaintiff had alleged that in the year 1955, the father of the defendant had leased out the suit shop to his father and uncle namely Balkrishna Raikar and Yeshwant Raikar respectively, on a monthly rent of Rs.30/-, where his said father and uncle carried on business jointly till the year 1965 and, thereafter, his uncle Yeshwant Raikar, left the said premises to set up a separate business at Mapusa, while his father, the said Balkrishna Raikar, continued with his business in the suit shop and in the year 1970, entrusted the said business to the plaintiff, on account of the health problem of his said father. The plaintiff further alleged that his father the said Balkrishna Raikar expired on 05.07.1993 and that the plaintiff had tried to pay the rent to the defendant by money order which was refused by the defendant and, thereafter, the defendant had filed a case for eviction of Shambu Raikar before the Rent Controller Court, Mapusa, who is the cousin brother of the

plaintiff and who had otherwise no interest in the shop premises and had obtained an order of eviction against the said Shambu Raikar and after the plaintiff came to know about the said Order, he apprehended dispossession of the suit shop at the hands of the defendant and, therefore, filed the suit for permanent injunction. On the other hand, the case of the defendant was that the suit shop was let out to the uncle of the plaintiff namely the said Yeshwant Raikar who was doing business therein and the said father of the plaintiff namely Balkrishna Raikar had no right or connection in respect of the suit shop. After the death of the said uncle of the plaintiff, his son Shambu Raikar had continued the business in the suit shop and, in the year 1995, the defendant had filed an eviction case against the said Shambu Raikar and by Order dated 03.11.1998, the said Shambu Raikar was ordered to be evicted. The case of the defendant was that earlier in June, 1993, the plaintiff had driven out the said Shambu Raikar and had started doing business in the suit shop without the permission and consent of the defendant and therefore, by notice dated 07.01.1995, the defendant had asked the plaintiff to vacate the suit shop but the plaintiff failed to comply with the same. The defendant contended that the plaintiff had no right to continue in possession of the suit shop and filed a counter claim against the plaintiff to obtain vacant possession of the suit shop.

4. The Trial Court referred to the Lease Deed, exhibit D.w.1/A colly, by which, the father of the defendant had leased out the premises to the uncle of the plaintiff, the said Yeshwant Raikar, and observed that in the notice dated 07.01.1995, (Exhibit P.w.1/F), the defendant had admitted that the father of the defendant was occupying the suit shop premises and was paying rent after the death of Yeshwant Raikar. The learned trial Court also referred to the solitary rent receipt- exhibit P.w.1/D, allegedly issued by the defendant to the late father of the plaintiff and having compared the signature on the said receipt, came to the conclusion that the father of the defendant was the tenant of the suit shop and proceeded to decree the suit and dismiss the counter claim.

5. The defendant having filed an appeal against the said Judgment/Decree of the trial Court, by Judgment dated 16.09.2005 in R.C.S. No. 104/2001 the learned Additional District Judge came to the conclusion that the plaintiff had failed to establish his claim of tenancy and that the findings of the Trial Court were not based on established principles of law. The learned ADJ also came to the conclusion that the defendant had proved that the said Yeshwant was his tenant and, as such, the plaintiff

had no right to occupy the suit shop and, therefore, proceeded to decree the counter claim and dismissed the suit filed by the plaintiff.

6. Although the plaintiff had pleaded a joint tenancy having been created by the defendant's father in favour of the plaintiff's father and uncle Yeshwant Raikar, the learned ADJ observed that the plaintiff in his evidence had not stated anything about the creation of joint tenancy in favour of his father Balkrishna and his uncle Yeshwant Raikar and that on the contrary, the plaintiff had stated that he did not know in which year the suit shop was let out to them by the father of the defendant and that he also did not know whether there was any Deed of Lease in respect of the suit shop and at the same time had admitted that the father of the defendant had entered into a Lease Deed with the uncle of the plaintiff, namely the said Yeshwant Raikar, and which in fact, was produced by the defendant at exhibit D.w.1/A. In the absence of any Lease Deed having been produced by the plaintiff in support of the plea of joint tenancy which was otherwise not substantiated in the evidence by the plaintiff and on the face of the tenancy agreement produced by the defendant, the learned ADJ came to the conclusion that the joint tenancy was in favour of his father and uncle namely the said Balkrishna and Yeshwant Raikar was not proved but the defendant had

succeeded to prove that a tenancy was created in favour of plaintiff's uncle alone namely the said Yeshwant M. Raikar by virtue of the said agreement dated 01.03.1955, exhibit D.w.1/A

7. Although the plaintiff claimed that his father exclusively occupied the suit shop from 1965 onwards, all that the plaintiff was able to produce was a solitary receipt of payment of rent, which in the list of documents, was shown as dated 21.10.1982, and which was produced as exhibit P.w.1/D and the same was dated 21.10.1992 and which was otherwise denied having been issued by the defendant. The learned trial Court readily accepted the said receipt as proof of payment of rent by the defendant but the learned ADJ, by meticulous exercise which is reflected in Para 24 of the Judgment, refused to accept for want of sufficient proof that the said receipt exhibit P.w.1/D was issued by the defendant. The other reasons for not accepting the said rent receipt exhibit P.w.1/D, dated 21.10.1992, as not proved, have been recorded by the learned ADJ in Para 15 of the Judgment. In fact, the learned ADJ has noted that the plaintiff had stated that the business was entrusted to the plaintiff by his father from the year 1970, and being so, the plaintiff had not explained why his father had paid the rent allegedly on 21.10.1992, when the plaintiff's father was

neither attending to the business in the suit shop nor was looking after the same. The learned ADJ also observed, and in my view rightly, that the plaintiff had not pleaded about the issue of the said rent receipt by the defendant to his father. The learned ADJ rightly observed that in case the business of the said suit shop was entrusted by the plaintiff in the year 1970, then the plaintiff ought to have paid the rent to the defendant and the said receipt had ought to have been in the name of the plaintiff. The learned ADJ also observed that the plaintiff had averred that the plaintiff had tried to pay monthly rent to the defendant but the same was refused by the defendant and this averment indicated that no rent was accepted by the defendant from the plaintiff at any time and the logical conclusion was that although the plaintiff took over the business in the suit shop from the year 1970 and had attempted to pay the rent to the defendant, the defendant had not accepted the same and, therefore, the production of the said rent receipt by the defendant did not deserve any creditability. The learned ADJ has rightly observed that in view of the denial of the said rent receipt, having been issued by the defendant, it was necessary for the plaintiff to have proved the issue of the said rent receipt. The learned ADJ has observed that there was no evidence that the said rent receipt was signed by the defendant in the presence of the plaintiff in as much as the plaintiff has

also not identified the handwriting of the defendant on the said receipt nor the plaintiff had examined any expert to prove the signature of the defendant. The learned ADJ therefore came to the conclusion and, in my view rightly, that the plaintiff had not proved that the said rent receipt, exhibit P.w.1/D, was issued by the defendant. As far as the notice exhibit P.w.1/F is concerned, the same has been dealt with at length by the learned ADJ in Para 18 of the Judgment. It was stated in the said notice that the father of the defendant had leased the suit premises to Yeshwant Raikar, the uncle of the plaintiff and, on his demise, Balkrishna was occupying the same and, upon the death of the said Balkrishna, Shri Shambu, the son of Yeshwant was occupying the same. The learned ADJ has observed that by no stretch of imagination, the statement in the said notice could be taken to mean that the defendant had accepted that father of the plaintiff namely the said Balkrishna was his tenant. Moreover, the learned ADJ observed that the said statement was explained by the defendant in his testimony by saying that the said notice was given by his brother under a wrong impression and, therefore, could not be called as an admission. The learned ADJ also placed reliance in that context on the decision of the Apex Court in the case of ***T.H. Musthaffa v. M. P. Varghese & Ors. (1999) 8 S.C. 692).***

8. The learned ADJ has also discussed the evidence led on behalf of the plaintiff which, to a great extent, was in variance with his pleadings and that of the witnesses of the plaintiff in Para 16 and 17 of the Judgment. The conclusion arrived at by the learned ADJ have been arrived at after a meticulous analysis of the documentary and oral evidence led on behalf of the parties. None of the formulated questions as substantial questions of law do arise in this second appeal in the light of what the Supreme Court has explained in Para 14 of its Judgment in the case of ***Santosh Hazari v. Purshottam Tiwari (2001) 3 SCC 179***. The rationale behind permitting second appeals, has now been explained by the Supreme Court in Para 67 of the Judgment in the case of ***Gurudev Kaur and Ors. v. Kaki & Ors. 2006 AIR SCW 2404***, by stating that the rationale behind allowing a second appeal on a question of law is, that there ought to be some Tribunal having a jurisdiction that will enable it to maintain, and where necessary, re-establish uniformity throughout the State on important legal issues, so that within the area of the State, the law, in so far as it is not enacted law, should be laid down, or capable of being laid down, by one Court whose rulings will be binding on all Courts, Tribunals and authorities within the area over which it has jurisdiction. The Judgment of the learned ADJ is

Judgment which has been given on analysis of the evidence produced, both oral and documentary produced on behalf of the parties. In my view, no substantial question of law is involved in this case much less as formulated on behalf of the plaintiff in the memorandum of appeal.

In my view, there is no merit in this second appeal and, accordingly, the same is hereby dismissed in limine.

N. A. BRITTO, J.

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